Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BALFOUR BEATTY BAHAMAS LIMITED,

Petitioner,

v.

FRED M. BUSH,

Respondent,

Petition for Writ of Certiorari
To the United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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468

QUESTION PRESENTED

Whether it is proper to limit the enforceability of a diversity jurisdiction judgment entered by a United States District Court sitting in the state of Florida to only five years when a judgment entered by a court of general jurisdiction in the state of Florida is enforceable for twenty years.

PARENT COMPANIES

Petitioner Balfour Beatty Bahamas, Ltd is a Bahamian private company wholly owned by Balfour Beatty, Ltd. Balfour Beatty, Ltd. is a United Kingdom private company wholly owned by BICC Investments Holdings, Ltd. BICC Investments Holdings, Ltd. is a United Kingdom private company wholly owned by BICC, plc. BICC, plc is a United Kingdom public company listed on the London Stock Exchange.

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No. _____

In The

Supreme Court of the United States

BALFOUR BEATTY BAHAMAS LIMITED,

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FRED M. BUSH,

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Petition for Writ of Certiorari
To the United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Balfour Beatty Bahamas Limited (BBB) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding because the Court of Appeals for the Eleventh Circuit has decided an important federal question that conflicts with relevant decisions of this Court and the United States Code and mandates such a departure by the lower court as to call for an exercise of this Court's supervisory power.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit denying the petition for rehearing and suggestion for rehearing en banc dated is unpublished. It is reprinted in Appendix A page A-. The opinion of the Court of Appeals for the Eleventh Circuit reversing the United States District Court for the Southern District of Florida is reported at 170 F.3d 1048 (App. A - p.2). The opinion of the United States District Court for the Southern District of Florida is reported at 217 B.R. 339 (App. A - p. 10).

JURISDICTION

In 1997, the United States District Court for the Southern District of Florida denied Bush's Motion for protection against discovery which BBB sought in aid of its 1991 judgment against Bush in a diversity action. In an opinion dated January 29, 1998, the district court rejected Bush's argument that execution on a federal judgment was subject to a five year statute of limitations. The District Court held that execution on a federal judgment by a district court sitting in the state of Florida in a diversity action was subject to the same twenty year statute of limitations that would apply to a judgment issued by a Florida state court. Bush appealed to the Court of Appeals for the Eleventh Circuit which overruled the district court in an opinion dated March 25, 1999. On June 7, 1999, the Court of Appeals for the Eleventh Circuit denied BBB's timely filed motion for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within ninety days of the denial of BBB's motion for rehearing and suggestion for rehearing en banc.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

The text of Federal Rule of Civil Procedure 69 is set out in Appendix B page 1("App. B - p.1).

The text of 28 U.S.C. §1962 is set out in Appendix B - p.2.

The text of Florida Statutes Section 55.10 is set out in Appendix B - p.2.

The text of Florida Statutes Section 56.021 is set out in Appendix B - p.6.

The text of Florida Statutes Section 95.11 is set out in Appendix B - p.7.

STATEMENT OF THE CASE

In November 1989, BBB filed a multi-count complaint against Bush and other defendants alleging in part that Bush had committed fraud. In January 1991, after Bush failed to participate in the discovery process, the district court entered a default judgment against him, and in favor of BBB, for $151,815.50. In May 1991, BBB obtained a writ of execution against Bush and docketed the same with the United States Marshals office in West Palm Beach, Florida in anticipation of collecting its judgment. Several months later, that effort was foiled when Bush filed for bankruptcy under Chapter 7 of the Bankruptcy Code. BBB challenged Bush's bankruptcy filing and, in June 1992, the bankruptcy court ruled in BBB's favor, finding Bush's district court judgment non-dischargeable. Bush challenged the non-dischargeability finding - appealing, ultimately, to the Eleventh Circuit Court of Appeals which affirmed the bankruptcy and district court's ruling on August 31, 1995. The above brief historical context is set forth in much greater detail in the August 31, 1995 opinion of the Eleventh Circuit published at 62 F.3d 1319. (App. A - p.16)

In November 1997, BBB served discovery upon Bush in aid of execution pursuant to Federal Rule of Civil Procedure 69. Bush filed a motion for a protective order and relying upon Fla. Stat. Ann. § 95.11(2)(a) argued BBB no longer could enforce the judgment as more than five years had passed since the issuance of the default judgment in January 1991. The district court disagreed and ruled the enforceability of its judgment was controlled instead by the same twenty-year limitations period of Fla. Stat. Ann. § 95.11(1) applicable to judgments by Florida state courts.

Bush appealed to the Eleventh Circuit which reversed the district court. The Eleventh Circuit held that even though a judgment entered by a Florida state court was enforceable for twenty years, a diversity jurisdiction judgment entered by a United States District Court sitting in the state of Florida was enforceable only for five

years. The Eleventh Circuit denied BBB's timely motion for rehearing and/or suggestion of rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Interpretation and Application of Federal Rule of Civil Procedure 69(a) and Florida Statute § 95.11(2) to Limit the Enforceable Life of a Diversity Jurisdiction Judgment issued by United States District Court Sitting in the State of Florida to Only Five Years When a Judgment Entered by a Court of General Jurisdiction in the State of Florida Is Enforceable for Twenty Years Violates 28 U.S.C. § 1962.

In its opinion, the Eleventh Circuit correctly notes that according to Federal Rule of Civil Procedure 69, the process to enforce a judgment for the payment of money rendered by a United States District Court is by writ of execution and that the procedure on execution is to be in accordance with the practice and procedure of the state in which the United States District Court is held as they exist at the time the remedy of enforcement is sought. The Eleventh Circuit, however, overlooks a critical exception. Rule 69 goes on to provide that "except that any statute of the United States governs to the extent that it is applicable."

28 U.S.C. Section 1962 requires that a judgment rendered by a United States District Court sitting within a particular state receive the same treatment as a judgment of a court of general jurisdiction in that same particular state. See, Rhea v. Smith, 247 U.S. 434 (1927)(interpreting predecessor to 28 U.S.C. § 1962) Specifically, 28 U.S.C. Section 1962 provides as follows:

> Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease

to be a lien in the same manner and time. (*emphasis* added)

While 28 U.S.C. Section 1962 only speaks literally in terms of "liens," it is clear that the purpose of the statute is as stated above. In the state of Florida, the manner, extent and conditions that a judgment becomes and ceases to be a lien on real property is governed by Section 55.10, Fla. Stat. Ann. The manner, extent and conditions that a judgment becomes a lien on real property is governed by common law. In both circumstances, the manner in which the liens cease to be liens is dependent upon the continued validity of the judgment itself.

For instance, the creation and termination of a lien on personal property is dependent upon the continuing validity of the writ of execution. Jacksonville Bulls Football, Ltd. v. Blatt, 535 So.2d 626 (Fla. 3d DCA 1988)(the judgment creditor's lien attaches to personal property and priority is established at the time the writ of execution is delivered to the sheriff in the county where the personal property is located). Under Florida law, a writ of execution is valid during the life of the judgment or decree. Fla. Stat. Ann. § 56.021. If the life of a judgment rendered by a district court in the state of Florida ceases prior to the life of a judgment rendered by a court of general jurisdiction in the state of Florida, then there is a violation of 28 U.S.C. § 1962 because the lien to be created by the district court cannot "be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State...." 28 U.S.C. § 1962. Moreover, there is a violation of 28 U.S.C. § 1962 because the lien to be created by the district court will not "cease to be a lien in the same manner and time." 28 U.S.C. §1962.

In order for every judgment rendered by a United States District Court sitting in Florida to become and cease to be a lien in the same manner as a judgment of a court of general jurisdiction sitting in the state of Florida, the judgment rendered by a United States District Court must have the same life, twenty years, as a judgment of a court of general jurisdiction sitting in the state of

Florida. Since the opinion of the Eleventh Circuit limits the life of a judgment rendered by a United States District Court sitting in the state of Florida to only five years, it is not in accord with the requirements of Federal Rule of Civil Procedure 69 and 28 U.S.C. § 1962. Moreover, to the extent that the law of the state of Florida requires such a result, it also violates the requirements of 28 U.S.C. § 1962 and, therefore is not enforceable.

II. The Eleventh Circuit's Interpretation and Application of Federal Rule of Civil Procedure 69(a) and Application of Florida Statute § 95.11(2) to Limit the Enforceability of a Judgment Rendered by a United States District Court Sitting in the State of Florida to Only Five Years When a Judgment Entered by a Court of General Jurisdiction in the State of Florida Is Enforceable for Twenty Years Violates the Twin Aims of the Erie Doctrine as Spelled out in Hanna V. Plumer, 380 U.S. 460 (1965).

According to this Court, the following are "the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws." Hanna, supra, at 468. The Eleventh Circuit's opinion limiting the enforceable life of a United States District Court sitting in the state of Florida to only five years defeats both of the twin aims of the *Erie* rule. First, the limitation of the life of a federal judgment rendered by a United States District Court sitting in the state of Florida to only five years will encourage forum shopping in that defendants sued in state court which meet the requirements of diversity jurisdiction will remove that action to the federal court so that in the event a judgment is rendered against them, that judgment will have enforceable life of only five years instead of an enforceable life of twenty years for a judgment rendered by a state court of Florida. Second, the limitation of the life of a federal judgment rendered by a United States District Court sitting in the state of Florida to only five years results in the inequitable administration of the laws between judgments rendered by the federal court and the state court. If the Eleventh Circuit's opinion stands as written, out of state residents who otherwise would bring an action in the federal court will be required to bring the action in

a state court in order to ensure that they do not receive a judgment which has an enforceable life of only five years - one-fourth of the enforceable life of a judgment rendered by a state court.

In order to avoid this situation, the Eleventh Circuit should have viewed itself as merely another court of the state of Florida. Stafford v. International Harvester Company, 668 F.2d 142 (2nd Cir. 1981). The Eleventh Circuit is mandating that the district court not look at itself as another court of the state of Florida and to treat its own judgment as if it has been rendered by a different court. In order to meet the requirements of the *Erie* rule, the Eleventh Circuit should have the district court both look at itself as a court of the state of Florida and also to look at its judgment as a judgment of a court of the state of Florida. A failure to approach the selection of the appropriate period of limitations for a judgment rendered by a United States district court sitting in Florida will result in the dangers of forum shopping and cause inequitable administration of the laws between state and federal courts sitting in the state of Florida.

3. Supplementary Proceedings do not constitute an action upon the judgment and, therefore, the five year period of limitation to bring an action on a judgment found in Florida Statute Section 95.11(2) does not apply to bar either the ability to conduct discovery in aid of levy and execution on a judgment or the ability to levy and execute on a judgment after five years from the date judgment was entered.

So far as judgments are concerned, the Eleventh Circuit's interpretation of Florida Statute Section 95.11(2) simply provides that actions on them under the facts of this case must be commenced within five years after the judgment was entered. However, discovery in the aid of execution is not an action on a judgment. See, Young v. McKenzie, 46 So.2d 184 (Fla. 1950)("[T]he 'proceedings supplementary' do not constitute 'an action on the judgment . . . .' Such proceedings are not necessary to bring new life to the judgment itself or the lien of the judgment, and seem to bear no direct relation to it. They are in the nature of proceedings in discovery of property which should be made available to the execution.").

In Re Kilby, 196 B.R. 627 (Bkrtcy. M.D. Fla. 1996) and Kiesel v. Graham, 388 So.2d 594 (1980), both cited by the Eleventh Circuit in support of its decision, are inapposite. In Re Kilby involved a writ for garnishment that was found by the court to be an "action on the judgment." Id. at 629. Similarly, in Kiesel, an action by judgment creditors sought by "mandamus" to require judgment debtors to make payment of an admiralty judgment entered against them in federal court. Neither case involved mere discovery in aid of enforcing a judgment nor mere execution and levy on a judgment. Rather, the proceedings at issue in those cases involved independent actions on a judgment. Accordingly, Section 95.11(2) of the Florida Statutes is not applicable.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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BALFOUR BEATTY BAHAMAS, LTD., Plaintiff-Appellee,

v.

Fred M. BUSH, Defendant-Appellant.

No. 98-4195.

United States Court of Appeals,
Eleventh Circuit.
June 7,1999.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before DUBINA and BARKETT, Circuit Judges, and JONES [FN*], Senior Circuit Judge.

FN* Honorable Nathaniel R. Jones, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

BALFOUR BEATTY BAHAMAS, LTD., Plaintiff-Appellee,
v.

Fred M. BUSH, Defendant-Appellant.

No. 98-4195.

United States Court of Appeals,
Eleventh Circuit.
March 25, 1999.

Before DUBINA and BARKETT, Circuit Judges, and JONES [FN*], Senior Circuit Judge.

FN* Honorable Nathaniel R. Jones, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

NATHANIEL R. JONES, Senior Circuit Judge:

This appeal raises a question of first impression: Is an action brought in a Florida federal district court, to enforce a district court judgment entered earlier in the same court, governed by the five-year limitations period of Fla. Stat. Ann. § 95.11(2)(a) (West Supp.1999), or the twenty-year limitations period of Fla. Stat. Ann. § 95.11(1) (West Supp.1999)? The district court below found the twenty-year limitations period controlled, and therefore denied a motion by defendant-appellant, Fred Bush ("Bush"), for a Protective Order. The motion was brought by Bush to stay the post-judgment discovery sought by plaintiff-appellee, Balfour Beatty Bahamas, Ltd. ("BBB")--e.g., interrogatories and subpoenas duces tecum--concerning the judgment monies which Bush has yet to pay BBB. The district court held that because BBB's judgment was valid, and its collection efforts timely (i.e., not barred on limitations grounds), BBB was entitled to the judgment-related discovery it sought. See Balfour Beatty Bahamas, Ltd. v. Boca Raton Millwork, Inc., 217 B.R. 339, 341 (S.D.Fla.1998). Bush, arguing that BBB waited too long to

enforce its $151,815.50 judgment, now appeals. For the reasons that follow, we reverse, and find BBB's post-judgment recovery efforts barred by § 95.11(2)(a).

I.

The relevant facts of this matter are straightforward. In November 1989, BBB filed a multicount complaint against Bush and other defendants. In that pleading, BBB claimed that Bush had committed fraud. In January 1991, after Bush failed to participate in the discovery process, the district court entered a default judgment against him, and in favor of BBB, for $151,815.50. In May 1991, BBB obtained a writ of execution against Bush in anticipation of collecting its judgment. Several months later, that effort was foiled when Bush filed for bankruptcy under Chapter 7 of the Bankruptcy Code. BBB challenged Bush's bankruptcy filing and, in June 1992, the bankruptcy court ruled in BBB's favor, finding Bush's district court judgment non- dischargeable. Bush challenged the non-dischargeability finding--appealing, ultimately, to this court--and a different panel affirmed the bankruptcy court's ruling in August 1995. See In re Bush, 62 F.3d 1319, 1325 (11th Cir.1995).

For reasons that remain unclear, BBB did not timely proceed to obtain its judgment monies from Bush thereafter. Instead, BBB waited until November 1997 before serving the instant discovery requests upon Bush. Bush declined to provide the requested discovery, and filed the subject motion for a Protective Order. In the motion, Bush, relying upon Fla. Stat. Ann. § 95.11(2)(a), argued that BBB could no longer collect judgment monies from him, as more than five years had passed since the issuance of the default judgment in January 1991. The district court disagreed with Bush; found this dispute controlled instead by the twenty-year limitations period of Fla. Stat. Ann. § 95.11(1); and denied Bush's motion. This appeal--of the district court's Discovery Order--timely followed.

We are thus now asked to decide whether the district court erred in (1) denying Bush's motion for a Protective Order, and (2) finding that BBB's post-judgment collection efforts are controlled by Fla. Stat. § 95.11(1) instead of § 95.11(2)(a). In conducting that analysis, the district court's factual findings are reviewed for clear error, and its legal conclusions are reviewed de novo. Beck v. Prupis, 162 F.3d

1090, 1100-01 (11th Cir.1998). Our review here is de novo, given that the question before us is one of law, not fact; and also because neither party disputes the district court's post-judgment recitation of facts.

II.

As the district court correctly found, BBB's efforts to execute its judgment are controlled, at the time of execution, by the "practice[s] and procedure[s] of the state in which the district court is held...." Fed.R.Civ.P. 69(a). See also Leasco Response, Inc. v. Wright, 99 F.3d 381, 382 (11th Cir.1996) (per curiam). In this case, that state is Florida. Florida's statute of limitations, Fla. Stat. Ann. § 95.11, provides in relevant part:

> 95.11 Limitations other than for the recovery of real property
> Actions other than for recovery of real property shall be commenced as follows:
> (1) Within twenty years.--An action on a judgment or decree of a court of record in this state.
> (2) Within five years.--
> (a) An action on a judgment or decree of any court, not of record, of this state or any court of the United States, any other state or territory in the United States, or a foreign country.

The applicability, in cases such as this, of § 95.11(1) versus § 95.11(2)(a) is a question the Florida Supreme Court has yet to address. We acknowledged that state-of-the-caselaw three years ago when presented with the same question in Leasco; accordingly, we then certified the issue to the Florida Supreme Court. See Leasco, 99 F.3d at 383 (certifying the following question: What is the appropriate statute of limitations for an action brought in a federal district court in Florida involving a judgment entered by that same court?). Before the Florida Supreme Court could answer the question, however, the Leasco litigants settled their dispute. Thus, we are now presented with the identical question a second time. Rather than again certify the question, we have elected to decide the issue in the manner in which we respectfully believe the Florida Supreme Court would act. Cf. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

III.

Our analysis of the scant cases from the lower Florida courts leads us to the conclusion that the Florida Supreme Court would apply here the five-year limitations period of § 95.11(2)(a), not the twenty-year limitations period of § 95.11(1). Although the lower Florida courts have had rare occasion to visit the issue, we note that the issue was fully addressed by the Florida Court of Appeals in Kiesel v. Graham, 388 So.2d 594 (Fla.Dist.Ct.App.1980). In adopting § 95.11(2)(a) as controlling, the Kiesel court reasoned as follows:

> Both [§§ 95.11(1) and 95.11(2)(a)] appear to govern the instant situation, for the subject judgment is that "of a court of record in this state" as well as that "of any court of the United States." This apparent conflict, however, can be readily resolved by resort to well-accepted principles of statutory construction. It is a general rule of statutory construction that a more specific statute covering a particular subject is controlling over a statutory provision covering the same subject in more general terms. In this situation, the phrase "of any court of the United States" is more specific than "of a court of record in this state." The former clearly limits its scope to courts of the United States, while the latter could include both federal and state courts, as long as they are in Florida. Hence, it must be concluded that [§]95.11(2)(a) will operate as an exception to, or a qualification of, the more general terms of [§]95.11(1). Adams v. Culver, 111 So.2d 665 (Fla.1959); Woodley Lane, Inc. v. Nolen, 147 So.2d 569 ***1051** [(Fla.Dist.Ct.App.1962)]; State ex rel. Johnson v. Vizzini, 227 So.2d 205 (Fla.1969).
>
> This result is further supported by the corollary principle that the last expression of legislative will is the law, and, therefore, that the last in point of time or order of arrangement prevails. This rule is applicable where the conflicting provisions appear in different statutes[,] Sharer v. Hotel Corporation of America, 144 So.2d 813 (Fla.1962)[ ], or in different provisions of the same statute. State v. Hialeah, 109 So.2d 368 (Fla.1959); DeConingh v. Daytona Beach, 103 So.2d 233 [(Fla.Dist.Ct.App.1958)]. In

> this situation, two provisions in the same [statute], the former covering "courts of record in this state" and the latter covering "judgments of any court of the United States," are in direct conflict. Application of the principle set forth in [ ]Hialeah, supra, and DeConingh [ ], supra, dictates that the latter provision, now enumerated in [§]95.11(2)(a), must govern.

Id. at 595-96 (brackets added and deleted; footnote and italics deleted). We find Kiesel well-reasoned, and adopt its holding with respect to the unique facts presented here, i.e., an attempt to enforce a district court judgment, entered in the Southern District of Florida, in the same district court. We therefore hold that, under such circumstances, the five-year limitations period set forth in Fla. Stat. Ann. § 95.11(2)(a) controls. In view of the fact that BBB's post-judgment collection efforts--which exceeded the five-year period--are thus barred by § 95.11(2)(a) as untimely, we find, after a de novo review of the record, that the district court erred in denying Bush's motion for a Protective Order. Accord In re Kilby, 196 B.R. 627, 629-30 (Bankr.M.D.Fla.1996).

IV.

The district court's post-judgment Discovery Order is therefore REVERSED.

BALFOUR BEATTY BAHAMAS, LTD., Plaintiff,

v.

BOCA RATON MILLWORK, INC., A Florida Corporation, and Fred M. Bush, an individual, Defendants.

No. 89-8558-CIV-GONZALEZ.

United States District Court,
S.D. Florida.
Jan. 22, 1998.

ORDER

GONZALEZ, District Judge.

This Cause has come before the Court upon Fred M. Bush and Barbara Bush's Motion for Protective Order, filed November 28, 1997.

In 1991, Plaintiff secured a final judgment from this Court and a writ of execution in the amount of $151,815.50 against Defendant Fred M. Bush. Later that year, Bush filed a voluntary Chapter 7 bankruptcy petition, seeking to avoid the judgment. The Bankruptcy Court held in 1992 that the judgment was not dischargeable in bankruptcy, and both the United States District Court and the United States Court of Appeals for the Eleventh Circuit affirmed the Bankruptcy Court's holding. On November 18, 1997, Plaintiff served Defendant and his wife with Post-Judgment Interrogatories and subpoenas for the taking of their depositions duces tecum in aid of execution. Defendant and his wife now seek a protective order precluding Plaintiff from seeking to collect its judgment, on the theory that the statute of limitations for such a collection of judgment has run.

Florida Statute § 95.11 provides as follows:

Actions other than for the recovery of real property shall be commenced as follows:
(1) Within twenty years--An action on a judgment or decree of a court of record in this state.
(2)Within five years--
(a)An action on a judgment or decree of any court, not of record, of this state or any court of the United States, any other state or territory in the United States, or a foreign country.

Defendant argues that the five-year limitation in subsection (2)(a) applies because the 1991 judgment was entered by a "court of the United States", namely, the United States District Court for the Southern District of Florida. Plaintiff, in turn, contends that the twenty-year limitation in subsection (1) applies because the United States District Court for the Southern District of Florida is a court of record in Florida.

In Leasco Response, Inc. v. Wright, 99 F.3d 381 (11th Cir.1996), the United States Court of Appeals for the Eleventh Circuit noted the lack of controlling precedent on the issue of enforcement of federal court judgments, and certified to the Florida Supreme Court the following question: "What is the appropriate statute of limitations for an action brought in a federal district court in Florida involving a judgment entered by that same court?" Id. at 383.

Because the parties to the Leasco action settled the case following certification of the question, the Supreme Court of Florida did not answer the certified question. As a result, this Court is without conclusive instruction as to the appropriate statute of limitations in this action.

The Eleventh Circuit's Leasco order, in discussing the proceedings below, provides some guidance, as does the Florida First District Court of Appeal case of Kiesel v. Graham, 388 So.2d 594 (1980). In Kiesel, the Court held that, when seeking to enforce a federal court judgment in state court, section (2)(a) (the five-year limitation) applies. The Kiesel court based its decision on the fact that "court of the United States" is a much more specific provision than "court of

record in the state", and specific statutes are controlling over their general counterparts. Id.

The federal district court in Leasco, on the other hand, found that the Kiesel rule applied only in cases in which a party was attempting to enforce a federal court judgment in state court, not when attempting to enforce a federal court judgment in the federal court that rendered it. The rationale behind this ruling was that, while it is understandable for a federal district court judgment to be considered "foreign" in a state court, it is absurd that a federal district court *341 judgment might be considered "foreign" in that same federal district court when the prevailing party seeks to enforce the judgment.

This Court agrees with the district court's finding in Leasco that subsection (1) (the twenty-year limitation period) applies in this action. Subsection (2)(a), the five-year limitation period, pertains to judgments foreign to the state of Florida, not domestic judgments. See Huff v. Pharr, 748 F.2d 1553, 1554 (11th Cir.1984). If the Court were to interpret that portion of subsection (2)(a) that refers to "any court of the United States" to include a court of the United States situated within this state, then a district court presiding over an action to enforce its own judgment would be constrained to view its own judgment as foreign. The Court finds it improbable that this is the construction intended by the legislators who drafted § 95.11 of the Florida Statutes.

Accordingly, having reviewed the motion and the record, and being otherwise duly advised, it is hereby ORDERED AND ADJUDGED that Fred M. Bush and Barbara Bush's Motion for Protective Order, filed November 28, 1997, is GRANTED IN PART and DENIED IN PART as follows:

1. The Motion is DENIED as to that portion requesting an order that Plaintiff is barred by Fla.Stat. § 95.11(2)(a) from any effort to collect its judgment.

2. The Motion is GRANTED as to the requirement that Plaintiff tender witness fees and mileage to Defendant Bush and Barbara Bush prior to their respective depositions, and Plaintiff is DIRECTED to

so provide.

3. The Motion is GRANTED as to the interrogatories served upon Barbara Bush, and she shall not be compelled to answer them.

In re Freddie Maxton BUSH, Debtor.
Freddie Maxton BUSH, Plaintiff-Appellant,
v.
BALFOUR BEATTY BAHAMAS, LIMITED, Defendant-Appellee.

No. 94-4871.

United States Court of Appeals,
Eleventh Circuit.
Aug. 31, 1995.

Before EDMONDSON, Circuit Judge, HILL, Senior Circuit Judge, and MILLS [FN*], District Judge.

FN* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

HILL, Senior Circuit Judge:

In this appeal we are asked to decide whether the appellee's judgment against the appellant is dischargeable in bankruptcy.

The bankruptcy court held that the judgment was nondischargeable and the district court affirmed. For the reasons set forth below, we affirm the order of the district court.

I. BACKGROUND

In November of 1989, Balfour Beatty Bahamas, Ltd. ("Balfour Beatty") filed a five count Complaint in the United States District Court for the Southern District of Florida styled Balfour Beatty Bahamas, Ltd. v. Boca Raton Millwork, Inc. and Fred M. Bush ("prior action"). [FN1] The five count Complaint contained only one count against Bush, stating a claim for fraud. In December of 1989, Bush filed an Answer and Counterclaim placing the fraud allegations in issue.

The parties commenced discovery, exchanging requests for documents and trial exhibits. This continued for several months, but

problems arose. Bush's counsel had such difficulty contacting Bush that the district court allowed him to withdraw from the case, granting Bush's motion to proceed pro se. The district court ordered all future pleadings be mailed directly to Bush at his home address. Subsequently, Bush failed to produce trial exhibits despite repeated requests by Balfour Beatty. He also failed to appear for a properly noticed deposition, after Balfour Beatty had sent him three reminder letters enclosing a copy of Federal Rule of Civil Procedure 37(d) outlining the possible consequences of failure to appear. Bush never produced the requested documents, nor appeared for his deposition.

In August of 1990, Balfour Beatty filed a motion for sanctions pursuant to Rule 37(d), Fed.R.Civ.P. Bush responded, claiming he had been out of state during the relevant time periods. Affidavits presented to the district court established that Bush received actual notice of his deposition more than ten days prior to the scheduled date, and that he was not in town on that date.

In November of 1990, the district court conducted a pre-trial conference. Bush failed to appear. During the conference, the court heard oral argument on Balfour Beatty's motion for sanctions. Finding that Bush's conduct warranted the imposition of sanctions, the district court entered a Pre-Trial Order granting Balfour Beatty a judgment by default on the grounds stated in its ***1322** Complaint. [FN2] Bush filed no objections to the default, nor to the proposed final judgment which was served on him. The Final Judgment was entered on January 29, 1991.

On November 7, 1991, Bush filed a voluntary Chapter 7 bankruptcy petition. In the dischargeability proceeding, Balfour Beatty timely filed an adversary complaint to determine dischargeability of its judgment debt against Bush. Balfour Beatty filed a motion for summary judgment, asserting that the default judgment in the prior action conclusively established the elements necessary for the bankruptcy court to hold the debt non-dischargeable under Bankruptcy Code § 523(a)(2)(A) as a debt for money obtained by fraud.

Bush argued that no preclusive effect should be accorded the prior judgment because the issue of fraud had not been actually litigated

in the prior action. Bush asserted that he was entitled to deny the fraud, and that Balfour Beatty must put on its proof. The bankruptcy court disagreed, and granted Balfour Beatty's motion for summary judgment holding that Bush was estopped by the default judgment to deny the fraud alleged in Balfour Beatty's complaint. The bankruptcy court then entered a final judgment holding the debt nondischargeable. On review, the district court affirmed the judgment.

II. DISCUSSION

The only issue on appeal is whether, in a bankruptcy discharge exception proceeding, a default judgment based upon allegations of fraud may be used to establish conclusively the elements of fraud and prevent discharge of the judgment debt. [FN3] This is an issue of first impression in this Circuit.

We review the decision of the bankruptcy court independently. In re St. Laurent, 991 F.2d 672, 675 (11th Cir.1993). The bankruptcy court's findings of fact are subject to a clearly erroneous standard of review. Fed.R.Bank.P. § 8013. See also In re Garfinkle, 672 F.2d 1340, 1344 (11th Cir.1982). Its conclusions of law are reviewed de novo. In re James Cable Partners, L.P., 27 F.3d 534, 536 (11th Cir.1994).

Collateral estoppel prohibits the relitigation of issues that have been adjudicated in a prior action. The principles of collateral estoppel apply in discharge exception proceedings in bankruptcy court. Grogan v. Garner, 498 U.S. 279, 285 n. 11, 111 S.Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991); In re Latch, 820 F.2d 1163 (11th Cir.1987).

In order for a party to be estopped from relitigating an issue regarding the dischargeability of a debt, a bankruptcy court must find the following four elements present:

1. The issue in the prior action and the issue in the bankruptcy court are identical;

2. The bankruptcy issue was actually litigated in the prior action;

3. The determination of the issue in the prior action was a critical and necessary part of the judgment in that litigation; and

4. The burden of persuasion in the discharge proceeding must not be significantly heavier than the burden of persuasion in the initial action.

In re Yanks, 931 F.2d 42, 43 n. 1 (11th Cir.1991) (citing Restatement (Second) of Judgments § 28(4) (1982)).

In the instant case, the bankruptcy court found that elements one and three were clearly present. [FN4] We agree. In finding the issue of fraud was actually litigated in the prior action, the bankruptcy court relied on a decision from the Eastern District of Michigan. That court held:

> Collateral estoppel applies only to those issues which were "actually" or "fully" litigated in the prior action. However, this rule does not refer to the quality or quantity of argument or evidence addressed to an issue. It requires only two things: first, that the issue has been effectively raised in the prior action, either in the pleadings or through development of the evidence and argument at trial or on motion; and second, that the losing party have had "a fair opportunity procedurally, substantively and evidentially" to contest the issue. The general rule therefore is that subject to these restrictions default judgments do constitute res judicata for purposes of both claim preclusion and issue preclusion (collateral estoppel).

Overseas Motors, Inc. v. Import Motors Ltd., 375 F.Supp. 499, 516 (E.D.Mich.1974), aff'd 519 F.2d 119 (6th Cir.), cert. denied, 423 U.S. 987, 96 S.Ct. 395, 46 L.Ed.2d 304 (1975) (citations omitted). Finding that Bush had ample opportunity to contest the fraud allegations in the prior action, the bankruptcy court gave preclusive effect to the default judgment.

Although Overseas Motors did not involve a bankruptcy discharge proceeding, [FN5] the Michigan district court did give preclusive

effect to a default judgment, observing that "a party cannot be permitted to avoid the law merely by avoiding the courts." 375 F.Supp. at 545.

The general federal rule, however, is to the contrary. [FN6] Ordinarily a default judgment will not support the application of collateral estoppel because "[i]n the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated." Restatement (Second) of Judgments § 27 cmt. e (1982). See also Restatement of Judgments § 68 cmt. d, e (1942). The circuits which have considered the issue in the context of bankruptcy discharge exception proceedings have adhered to this view. See e.g., Spilman v. Harley, 656 F.2d 224, 228 (6th Cir.1981) ("If the important issues were not actually litigated in the prior proceeding, as is the case with a default judgment, then collateral estoppel does not bar relitigation in the bankruptcy court.") (emphasis added); In re: Raynor, 922 F.2d 1146, 1150 (4th Cir.1991), In re Gottheiner, 703 F.2d 1136, 1140 (9th Cir.1983); In re McMillan, 579 F.2d 289, 292 (3d Cir.1978).

The underlying rationale of these decisions is that "a party may decide that the amount at stake does not justify the expense and vexation of putting up a fight. The defaulting party will certainly lose that lawsuit, but the default judgment is not given collateral estoppel effect." In re Gottheiner, 703 F.2d at 1140 (citations omitted).

There is authority to the contrary. A number of bankruptcy courts have given preclusive effect in a dischargeability proceeding to a prior default judgment. See e.g., In re Seifert, 130 B.R. 607, 609 (Bankr.M.D.Fla.1991); In re Austin, 93 B.R. 723 (Bankr.D.Colo.1988); In re Wilson, 72 B.R. 956, 959 (Bankr.M.D.Fla.1987); In re Eadie, 51 B.R. 890 (Bankr.E.D.Mich.1985). These courts have reasoned that:

> Debtor/defendant was given the full opportunity to defend himself in the [prior] action and he chose not to do so. Debtor/defendant could have reasonably foreseen the consequences of not defending

an action based in part on fraud. It would be undeserved to give debtor/defendant a second bite at the apple when he knowingly chose not to defend himself in the first instance.

In re Wilson, 72 B.R. at 959 (emphasis added).

We also are reluctant to allow this debtor a second bite at the apple. Bush actively participated in the prior action over an extended period of time. Subsequently, he engaged in dilatory and deliberately obstructive conduct, and a default judgment, based upon fraud, was entered as a sanction against him. He now attempts, in this bankruptcy proceeding, to avoid Section 523 by denying the fraud. Such abuse of the judicial process must not be rewarded by a blind application of the general rule denying collateral estoppel effect to a default judgment.

On facts very similar to the instant case, the Court of Appeals for the Ninth Circuit recently affirmed use of a default judgment entered as a sanction to estop a debtor from denying the fraud in bankruptcy court. In re Daily, 47 F.3d 365, 368-69 (9th Cir.1995). Characterizing the prior default judgment as not "ordinary," the Ninth Circuit noted that:

Daily did not simply decide the burden of litigation outweighed the advantages of opposing the [plaintiff's] claim and fail to appear. He actively participated in the litigation, albeit obstructively, for two years before judgment was entered against him. A party who deliberately precludes resolution of factual issues through normal adjudicative procedures may be bound, in subsequent, related proceedings involving the same parties and issues, by a prior judicial determination reached without completion of the usual process of adjudication. In such a case the "actual litigation" requirement may be satisfied by substantial participation in an adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so.

Id. at 368 (emphasis added). [FN7]

Like Daily, Bush did not simply give up at the outset. He actively participated in the adversary process for almost a year. He was represented by counsel. He answered the complaint. He filed a counterclaim. He filed discovery requests. After undertaking to represent himself, he began to refuse to cooperate in discovery. He refused to produce documents despite repeated requests. He refused to appear at his properly noticed deposition. He did respond to Balfour Beatty's Motion for Sanctions claiming he was out of state on the scheduled day. At the district court's properly noticed pre-trial conference, Bush failed to appear. As in Daily, the default judgment for fraud against Bush was ***1325** entered pursuant to Rule 37 as a sanction for deliberate refusal to participate in discovery. In upholding the bankruptcy court's award of preclusive effect to this judgment, the district court said:

> It would be fundamentally unfair to force Balfour Beatty to spend time and money preparing the same discovery simply because Bush has determined that he now wishes to defend the allegations of fraud and avoid his judgment debt in bankruptcy court.

We find Daily persuasive. Where a party has substantially participated in an action in which he had a full and fair opportunity to defend on the merits, but subsequently chooses not to do so, and even attempts to frustrate the effort to bring the action to judgment, it is not an abuse of discretion [FN8] for a district court to apply the doctrine of collateral estoppel to prevent further litigation of the issues resolved by the default judgment in the prior action. Bush had ample warning from the prior court and could reasonably have foreseen the conclusive effect of his actions. In such a case, collateral estoppel may apply to bar relitigation of the issues resolved by the default judgment. See Klingman v. Levinson, 831 F.2d 1292, 1296 (7th Cir.1987) (quoting 1B. J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.444[1], at 794 (2d ed. 1984)) ("Justice, then, is probably better served if ... collateral estoppel does not apply to ... default judgments ... unless it can be said that the parties could reasonably have foreseen the conclusive effect of their actions.") (emphasis added). As the Ninth Circuit observed in Daily:

> Without denying Daily his day in court, application of the doctrine served its central purposes of "protect[ing] [the prevailing party] from the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." By contrast, denying preclusive effect to the [prior] judgment on the ground that the issues relevant to discharge were not fully tried in that proceeding would permit Daily to delay substantially and perhaps ultimately avoid payment of the debt by deliberate abuse of the judicial process.

Id. at 368 (alteration in original) (citation omitted). Just as due process is not offended by the entry of a default judgment against a party for failure to cooperate with discovery, Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209-10, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255 (1958), neither is due process offended if a debtor is held to the consequences of that judgment in a subsequent bankruptcy discharge proceeding. See Blonder-Tongue Lab. Inc. v. University of Illinois Found., 402 U.S. 313, 328-29, 91 S.Ct. 1434, 1442-43, 28 L.Ed.2d 788 (1971). The order of the district court affirming the judgment of the bankruptcy court is

AFFIRMED.

FN1. Boca Raton Millwork, Inc. is a closely held corporation owned by Bush.

FN2. The district court also entered a default against Boca Raton Millwork, Inc. on its counterclaim against Balfour Beatty and deferred entry of a default against the corporation on Balfour Beatty's Complaint pending a lift of the automatic stay in effect as a result of the corporations's filing for bankruptcy.

FN3. 11 U.S.C. § 523(a)(2)(A) precludes the discharge of a debt for money obtained by fraud.

FN4. The bankruptcy court did not address the fourth element, that the burden of persuasion in the discharge proceeding not be significantly heavier than that in the initial action. The burden of proof in an action for fraud in a federal district court applying Florida law is a preponderance, or greater weight of the evidence. Watson Realty Corp. v. Quinn, 452 So.2d 568 (Fla.1984). The burden of persuasion in the bankruptcy action to prove fraud under § 523 is a preponderance of the evidence. See Grogan, 498 U.S. at 279, 111 S.Ct. at 655-56. This element is met.

FN5. The default judgment was entered against Overseas Motors for refusal to participate in a contractually required arbitration. Overseas Motors, in which the default was given preclusive effect, was a subsequent antitrust action in the Michigan district court.

FN6. Where the prior default judgment was rendered in state court, a different analysis may be required. In a recent opinion, the Bankruptcy Appellate Panel ("BAP") of the Ninth Circuit Court of Appeals held that 28 U.S.C. § 1738 and the Supreme Court's decision in Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985) require a bankruptcy court to apply Florida law to determine the preclusive effect of a Florida default judgment in a dischargeability proceeding. In re Nourbakhsh, 162 B.R. 841 (9th Cir. BAP 1994). The BAP reasoned that Section 1738 requires a bankruptcy court to apply the full faith and credit doctrine to dischargeability issues such as fraud; and the Supreme Court held in Marrese that this statute "directs a federal court to refer to the preclusion law of the State in which judgment was rendered" (quoting Marrese 470 U.S. at 380, 105 S.Ct. at 1332). Finding that in Florida "a default judgment conclusively establishes between the parties ... the truth of all material allegations contained in the complaint in the first action and every fact necessary to uphold the default judgment ...," (citing Perez v. Rodriguez, 349 So.2d 826, 827 (Fla.Dist.Ct.App.1977)), the BAP found that "a Florida State Court would hold that the entry of a default judgment is tantamount to a dispute that has been 'actually litigated.' " Nourbakhsh, 162 B.R. at 844. Under Marrese, the BAP held that a bankruptcy court must give preclusive effect to a Florida default judgment.

Another panel of this court has stated that the collateral estoppel law of the state rendering the judgment must be applied in a dischargeability proceeding. See In re St. Laurent, 991 F.2d 672, 675-76 (11th Cir.1993). Because we consider the preclusive effect of a prior federal court default judgment in the instant case, we do not reach the issue of whether Marrese requires that a Florida default judgment be accorded preclusive effect in a bankruptcy discharge proceeding.

FN7. Interestingly, the Ninth Circuit found support for this result in its prior decision in In re Gottheiner, 703 F.2d 1136 (9th Cir.1983), which is often cited, as did we above, for the proposition that collateral estoppel may not rest on a default judgment. In that case, however, the Ninth Circuit did approve use of a default judgment to estop a debtor from denying a debt in the dischargeability proceeding. The court found that the issues were "actually litigated" because the debtor in the previous action "did not simply give up from the outset. For sixteen months he actively participated in litigation.... That after many months of discovery Gottheiner decided his case was no longer worth the effort does not alter the fact that he had his day in court." Id. at 1140. Finding such circumstances "quite different" from an uncontested default, the Ninth Circuit held that the application of collateral estoppel was not an abuse of discretion.

FN8. We note that whether to allow issue preclusion is within the sound discretion of the trial court. Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322, 331, 99 S.Ct. 645, 651-52, 58 L.Ed.2d 552 (1979). The presence of mitigating factors in another case might cause a court to exercise discretion to deny preclusion to a default judgment even if the doctrine's formal elements are otherwise met. In some cases, the amount of money at stake or the inconvenience of the forum might disincline a defendant to offer a defense. In the case of such an "ordinary" default, a subsequent court might decline to allow preclusion. In this case, however, the amount of money was substantial, the forum was convenient and Bush did, in fact, participate in the litigation long after the issue was joined.

Federal Rule of Civil Procedure 69. Execution

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

(b) Against Certain Public Officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C., § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, § 8 (18 Stat. 401), U.S.C., Title 2, § 118, and when the court has given the certificate of probable cause for the officer's act as provided in those statutes, execution shall not issue against the officer or the officer's property but the final judgment shall be satisfied as provided in such statutes.

28 U.S.C. § 1962. Lien

Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time. This section does not apply to judgments entered in favor of the United States. Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to judgments of the courts of the State.

Florida Statutes, Section 55.10. Judgments, orders, and decrees; lien of all, generally; extension of liens; transfer of liens to other security

(1) A judgment, order, or decree becomes a lien on real estate in any county when a certified copy of it is recorded in the official records or judgment lien record of the county, whichever is maintained at the time of recordation, and it shall be a lien for a period of 7 years from the date of the recording provided that the judgment, order, or decree contains the address of the person who has a lien as a result of such judgment, order, or decree or a separate affidavit is recorded simultaneously with the judgment, order, or decree stating the address of the person who has a lien as a result of such judgment, order, or decree. A judgment, order, or decree does not become a lien on real estate unless the address of the person who has a lien as a result of such judgment, order, or decree is contained in the judgment, order, or decree or an affidavit with such address is simultaneously recorded with the judgment, order, or decree.

(2) The lien provided for in subsection (1) may be extended for an additional period of 7 years by rerecording a certified copy of the judgment, order, or decree within the 90-day period preceding the expiration of the lien provided for in subsection (1) and by simultaneously recording an affidavit with the current address of the person who has a lien as a result of the judgment, order, or decree. The lien will not be extended unless the affidavit with the current address is simultaneously recorded.

(3) In the event the lien is extended under subsection (2), the lien of the judgment, order, or decree may be further extended by re-recording a certified copy of it within the 90-day period preceding the expiration of the lien provided for in subsection (2) and by simultaneously recording an affidavit with the current address of the person who has a lien as a result of such judgment, order, or decree. The lien will not be extended unless the affidavit with the current address is recorded.

(4) In no event shall the lien upon real property created by subsections (1), (2), and (3) be extended beyond the period provided for in s. 55.081.

(5) This section shall be deemed to operate prospectively.

(6) Any lien claimed under subsections (1), (2), and (3) may be transferred, by any person having an interest in the real property upon which the lien is imposed or the contract under which the lien is claimed, from such real property to other security by either depositing in the clerk's office a sum of money or filing in the clerk's office a bond executed as surety by a surety insurer licensed to do business in this state. Such deposit or bond shall be in an amount equal to the amount demanded in such claim of lien plus interest thereon at the legal rate for 3 years plus $500 to apply on any court costs which may be taxed in any proceeding to enforce said lien. Such deposit or bond shall be conditioned to pay any judgment, order, or decree which may be rendered for the satisfaction of the lien for which such claim of lien was recorded and costs plus $500 for court costs. Upon such deposit being made or such bond being filed, the clerk shall make and record a certificate showing the transfer of the lien from the real property to the security and mail a copy thereof by registered or certified mail to the lienor named in the claim of lien so transferred, at the address stated therein. Upon the filing of the certificate of transfer, the real property shall thereupon be released from the lien claimed, and such lien shall be transferred to said security. The clerk shall be entitled to a fee of $10 for making and serving the certificate. If the transaction involves the transfer of multiple liens, an additional charge of $5 for each additional lien shall be charged. Any number of liens may be transferred to one such security.

(7) Any excess of the security over the aggregate amount of any judgments, orders, or decrees rendered, plus costs actually taxed, shall be repaid to the party filing the security or his or her successor in interest. Any deposit of money shall be considered as paid into court and shall be subject to the provisions of law

relative to payments of money into court and the disposition of these payments.

(8) Any party having an interest in such security or the property from which the lien was transferred may at any time, and any number of times, file a complaint in chancery in the circuit court of the county where such security is deposited for an order:

(a) To require additional security;

(b) To require reduction of security;

(c) To require change or substitution of sureties;

(d) To require payment or discharge thereof; or

(e) Relating to any other matter affecting said security.

Florida Statutes Section 56.021. Executions; issuance and return, alias, etc.

When issued, an execution is valid and effective during the life of the judgment or decree on which it is issued. When fully paid, the officer executing it shall make his or her return and file it in the court which issued the execution. If the execution is lost or destroyed, the party entitled thereto may have an alias, pluries or other copies on making proof of such loss or destruction by affidavit and filing it in the court issuing the execution.

Florida Statutes Section 95.11. Limitations other than for the recovery of real property

Actions other than for recovery of real property shall be commenced as follows:

(1) Within twenty years.--An action on a judgment or decree of a court of record in this state.

(2) Within five years.--

(a) An action on a judgment or decree of any court, not of record, of this state or any court of the United States, any other state or territory in the United States, or a foreign country.

(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument.

(c) An action to foreclose a mortgage.

(3) Within four years.--

(a) An action founded on negligence.

(b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority.

(c) An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 15 years after

the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

(d) An action to recover public money or property held by a public officer or employee, or former public officer or employee, and obtained during, or as a result of, his or her public office or employment.

(e) An action for injury to a person founded on the design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures.

(f) An action founded on a statutory liability.

(g) An action for trespass on real property.

(h) An action for taking, detaining, or injuring personal property.

(i) An action to recover specific personal property.

(j) A legal or equitable action founded on fraud.

(k) A legal or equitable action on a contract, obligation, or liability not founded on a written instrument, including an action for the sale and delivery of goods, wares, and merchandise, and on store accounts.

(l) An action to rescind a contract.

(m) An action for money paid to any governmental authority by mistake or inadvertence.

(n) An action for a statutory penalty or forfeiture.

(o) An action for assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment, or any other intentional tort, except as provided in subsections (4), (5), and (7).

(p) Any action not specifically provided for in these statutes.

(4) Within two years.--

(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

(b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued, except that this 4-year period shall not bar an action brought on behalf of a minor on or before the child's eighth birthday. An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the

incident giving rise to the injury occurred, except that this 7-year period shall not bar an action brought on behalf of a minor on or before the child's eighth birthday. This paragraph shall not apply to actions for which ss. 766.301-766.316 provide the exclusive remedy.

(c) An action to recover wages or overtime or damages or penalties concerning payment of wages and overtime.

(d) An action for wrongful death.

(e) An action founded upon a violation of any provision of chapter 517, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, but not more than 5 years from the date such violation occurred.

(f) An action for personal injury caused by contact with or exposure to phenoxy herbicides while serving either as a civilian or as a member of the Armed Forces of the United States during the period January 1, 1962, through May 7, 1975; the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence.

(g) An action for libel or slander.

(5) Within one year.--

(a) An action for specific performance of a contract.

(b) An action to enforce an equitable lien arising from the furnishing of labor, services, or material for the improvement of real property.

(c) An action to enforce rights under the Uniform Commercial Code--Bulk Transfers. [FN1]

(d) An action against any guaranty association and its insured, with the period running from the date of the deadline for filing claims in the order of liquidation.

(e) An action to enforce any claim against a payment bond on which the principal is a subcontractor or sub-subcontractor as defined in s. 713.01, for private work as well as public work, from the last furnishing of labor, services, or materials or from the last furnishing of labor, services, or materials by the general contractor if the general contractor is the principal on a bond on the same construction project, whichever is later.

(f) Except for actions described in subsection (8), a petition for extraordinary writ, other than a petition challenging a criminal conviction, filed by or on behalf of a prisoner as defined in s. 57.085.

(g) Except for actions described in subsection (8), an action brought by or on behalf of a prisoner, as defined in s. 57.085, relating to the conditions of the prisoner's confinement.

(6) Laches.--Laches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter regardless of lack of knowledge by the person sought to be held liable that the person alleging liability would assert his or her rights and whether the person sought to be held liable is injured or prejudiced by the delay. This subsection shall not affect application of laches at an earlier time in accordance with law.

(7) For intentional torts based on abuse.--An action founded on alleged abuse, as defined in s. 39.01, s. 415.102, or s. 984.03, or incest, as defined in s. 826.04, may be commenced at any time within 7 years after the age of majority, or within 4 years after the injured person leaves the dependency of the abuser, or within 4 years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later.

(8) Within 30 days for actions challenging correctional disciplinary proceedings.--**Any court action challenging prisoner disciplinary proceedings** conducted by the Department of Corrections pursuant to s. 944.28(2) must be commenced within 30 days after final disposition of the prisoner disciplinary proceedings through the administrative grievance process under chapter 33, Florida Administrative Code. Any action challenging prisoner disciplinary proceedings shall be barred by the court unless it is commenced within the time period provided by this section.

Supreme Court, U. S.
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No. 99-919

In The

Supreme Court of the United States

BALFOUR BEATTY BAHAMAS LIMITED,

Petitioner,

v.

FRED M. BUSH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The first and principal thrust of Petitioner's argument is that Florida Statute § 95.11(2)(a) violates the supremacy clause of the United States Constitution because it is in conflict with 28 U.S.C. § 1962. Aside from the fact that Petitioner did not argue this point to the Eleventh Circuit, this argument should fail because it is based upon the erroneous premise that a judgment lien requires a valid and enforceable judgment to support it.

28 U.S.C. § 1962 does not require that federal judgments be treated the same as state judgments, only that federal judgments be liens on property in the same manner, to the same extent and under the same conditions as state court judgments. This can occur without declaring Florida Statute § 95.11(2)(a) unconstitutional.

Anyone who is familiar with bankruptcy law knows that liens can exist, and be enforceable, beyond the life of the underlying debt or judgment. If a judgment creditor properly perfects a judgment lien that is not avoidable in bankruptcy, the lien is said to pass through the bankruptcy unaffected, even after the personal liability for the debt has been discharged. *Johnson v. Home State Bank*, 501 U.S. 78, 84; 111 S.Ct 2150; 115 L. Ed. 2d 66 (1991). The same is true with regard to dischargeable tax obligations. The debtor can discharge the tax liability but any properly perfected lien remains after the bankruptcy. If one accepts, then, that a judgment lien can exist and be enforceable despite the discharge or expiration of the underlying judgment debt, then there is no irreconcilable conflict between Florida Statute § 95.11(2)(a) and 28 U.S.C. § 1962. A properly perfected federal judgment lien

can be enforceable for 20 years even though the judgment itself is only enforceable for 5 years.

Petitioner next argues that the Eleventh Circuit's application of Florida Statute § 95.11(2)(a) to the facts of this case violates the *Erie* doctrine. *Erie* stands for the proposition that a state's decisional law, not a federal court's interpretation of "general law," governs the determination of a diversity jurisdiction case. It does not stand, as Petitioner would suggest, for the proposition that state law cannot differentiate between state court judgments and federal or foreign judgments. Furthermore, the effect of Florida Statute § 95.11(2)(a) is not so significant as to encourage forum shopping. Under 28 U.S.C. § 1962, the lien of the federal judgment lasts as long as the lien of a state court judgment. If a plaintiff elects to sue in federal court in Florida and is concerned that the judgment there obtained will only be effective for five years, he or she need only "domesticate" the federal judgment by recording a certified copy thereof in the office of the clerk of the circuit court of any county under the Florida Enforcement of Foreign Judgments Act, §§ 55.501-55.509, Florida Statutes. According to said Act, "A judgment so recorded shall have the same effect and . . . it may be enforced, released, or satisfied, as a judgment of a circuit or county court of this state." Florida Statutes § 55.503(1).

Petitioner also argues that the Eleventh Circuit misapplied Florida Statute § 95.11(2)(a) because discovery in aid of execution is not "an action upon a judgment." Certiorari is rarely granted when the asserted error consists of misapplication of the law. Nonetheless, it is not true that the limitation of § 95.11 for "an action upon a

judgment" only applies to a new and independent action and not to an attempt to enforce a judgment already in existence. In *Young v. McKenzie*, 46 So.2d 184 (Fla. 1950), the Florida Supreme Court held that the life span of an execution is not more than the judgment to which it relates. Therefore, an execution upon a judgment, even though it is not a new and independent action, must also be brought within the period of limitation of the judgment itself.

CONCLUSION

For the reasons given above the petition should be denied.

Respectfully submitted,

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